

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

77-1503

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GLENN BANKS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

GOVERNMENT'S APPENDIX

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1 emotionally, and focus on the important
2 points, you know, what sort of a person
3 was Mr. Banks when Gray approached
4 him, was he at that point predisposed
5 or did Mr. Gray entice him initially
6 into that conduct, and I think if you
7 take that approach and concentrate
8 on that approach in the case that
9 your verdict is going to be not
10 guilty. That's the way you have to
11 do it, dispassionately, keep your
12 eye on the ball, keep your eye on the
13 issue.

14 Thank you.

15 THE COURT: Mr. Wagner, do you have any
16 requests, any rebuttal?

17 MR. WAGNER: No, I do not, your Honor.

18 THE COURT: All right.

19
20 (Court Exhibit A marked.)

21
22 THE COURT: Now, at this point, ladies and
23 gentlemen, I am going to instruct you
24 on the law which you will apply to
25 the facts in the case when you reach



Full Text of Court's Instructions to the Jury.

1 the jury room and when you are deliberat-
2 ing. I emphasize again that the
3 attorneys have indicated that it is
4 your job alone to decide what the facts
5 are, to determine what the evidence
6 has proven and, of course, the key
7 fact in that is whether or not the
8 Government has proven the Defendant
9 guilty beyond a reasonable doubt as
10 to each count of the indictment, and
11 that term beyond a reasonable doubt
12 I will define for you in due course.
13 I don't intend to refer to my
14 recollection of the facts in these
15 instructions, if I do it will be solely
16 for the purpose of illustrating some
17 point of law, and if I do you are not
18 to let my recollection override your
19 own because, again, it is your recollec-
20 tion that controls as opposed to what
21 the attorneys remember and as to what
22 I remember. I don't think that I
23 have made any references throughout
24 the trial that should mislead you
25 or give you any implication, any ground

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Full Text of Court's Instructions to the Jury.

1 for any inference that I have a feeling
2 one way or the other in the case. I
3 made rulings on motions, I have made
4 rulings on objections to different
5 questions, I have instructed you a
6 couple times to ignore something that
7 has been said but in none of that is
8 there any feeling or any showing of
9 any feeling on my part that I have any
10 leaning toward any finding on any
11 issue or any finding as to whether or
12 not Mr. Banks is guilty.

13 There are four counts in the
14 indictment and each count necessarily
15 charges a separate crime. Now, I
16 will refer to the indictment in due
17 course. You must consider each crime
18 and the evidence that pertains to it
19 separately and then your verdict will
20 be returned as guilty or innocent as
21 to each count. Now, there are certain
22 basic rules of law which applies to
23 all criminal cases and I have referred
24 to some of these earlier in the trial
25 and you have to apply these in reviewing

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3.

Full Text of Court's Instructions to the Jury.

1 the evidence. The basic rule is that
2 the Defendant Mr. Banks is presumed
3 to be innocent and that presumption of
4 innocence remains with him throughout
5 this trial, it continues now and it
6 continues to exist until such time
7 that each one of you is convinced
8 beyond reasonable doubt by the legal
9 and competent evidence that is before
10 you that he is guilty of the offenses.
11 Now, the burden of proof that he is
12 guilty beyond a reasonable doubt rests
13 with the Government at all times and
14 never shifts to the Defendant and in
15 order to sustain its burden the
16 Government must present proof which
17 is sufficiently strong to convince
18 each of you of Mr. Banks' guilt beyond
19 a reasonable doubt. The requirement
20 that the prosecution prove the
21 Defendant guilty, the Defendant's
22 guilt rather beyond a reasonable doubt
23 extends to every essential element of
24 the crimes against the Defendant, and
25 I will define these elements for you.

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4.

Full Text of Court's Instructions to the Jury.

1 Now, however, in determining whether
2 the guilt of Mr. Banks as to each and
3 every essential element of the crimes
4 charged here has been established
5 beyond a reasonable doubt does not
6 limit it to the proof as it came from
7 the Government's witnesses. If you
8 are satisfied from a review of all of
9 the evidence in the case, both the
10 Government's and the Defendant's that
11 the evidence as to a particular count
12 establishes guilt beyond a reasonable
13 doubt then you may convict the
14 Defendant on that count. On the
15 other hand, if you have a reasonable
16 doubt at any point with respect to
17 a particular count under consideration
18 then you must acquit the Defendant on
19 that count, you must say that Mr.
20 Banks is not guilty of that particular
21 charge. As I said, you will separately
22 weigh and decide each of the four counts
23 in the indictment. Now, I have mentioned
24 reasonable doubt. I tell you that a
25 reasonable doubt is a doubt that is

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WESTERN DISTRICT OF NEW YORK

S.

Full Text of Court's Instructions to the Jury.

1 based upon reason and common sense
2 and which arises from the state of
3 the evidence. Now, it is rarely
4 possible to prove anything to an
5 absolute certainty and proof beyond
6 a reasonable doubt, therefore, is
7 established if the evidence is such as
8 you would be willing to rely and act
9 upon in the most important of your
10 own affairs. The Defendant is not
11 to be convicted on mere suspicion or
12 mere conjecture. A reasonable doubt
13 may arise not only from the evidence
14 produced but also from the lack of
15 evidence. Because the burden is
16 upon the Government, the prosecution
17 here, to prove Mr. Banks guilty beyond
18 a reasonable doubt as to every essential
19 element of each crime and the Defendant
20 has a right to rely upon the failure
21 of the Government to establish such
22 proof and in this sense you will not
23 be determining the Defendant's guilt
24 or innocence but only whether or not
25 the Government has proven beyond a

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6.

Full Text of Court's Instructions to the Jury.

1 reasonable doubt that he is guilty.
2 The Defendant is entitled to rely
3 upon evidence which is brought out on
4 cross examination of witnesses of the
5 prosecution, and the law as I have
6 told you before does not impose upon
7 the Defendant the duty of producing
8 any evidence. Nevertheless, the
9 Defendant did put into the case his
10 own testimony and other evidence.
11 Now, remember that a reasonable doubt
12 is such a doubt that is based upon
13 reason and as appeals to your power
14 of logic, it is a doubt arising out of
15 something tangible in the evidence in
16 the case or something lacking in the
17 case. It is to be distinguished from
18 a doubt which might be based on some
19 emotion such as upon a whim or a fancy.
20 It is a doubt for which you have a
21 reason regardless of whether you are
22 able to articulate that reason but
23 you must in your own mind have a
24 reason supporting that doubt and that
25 reason must be based on the evidence

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Full Text of Court's Instructions to the Jury.

1 or in something not present in the
2 evidence. Now, if you feel uncertain
3 and you are not fully convinced that
4 the Defendant is guilty of the crimes
5 charged and you believe you are acting
6 in a reasonable manner and you believe
7 a reasonable man or woman in any manner
8 of like importance would hesitate to
9 convict because of such a doubt as
10 you have that is a reasonable doubt
11 and the Defendant is entitled to its
12 benefit. If you have such a doubt
13 you must acquit Mr. Banks. As I
14 stated before, a reasonable doubt in
15 your mind as to any essential element
16 of the crimes charged entitles Mr.
17 Banks to an acquittal of that crime
18 and that count. This rule, however,
19 that the Government must prove every
20 essential element of the crime beyond
21 a reasonable doubt does not mean that
22 you must believe the testimony of
23 every Government witness as being true
24 beyond a reasonable doubt or that
25 every piece of evidence that is offered

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WESTERN DISTRICT OF NEW YORK

8.

Full Text of Court's Instructions to the Jury.

1 is true beyond a reasonable doubt.
2 It means only that the credible
3 evidence as weighed and found by you
4 under my instructions and viewed as a
5 whole must establish every essential
6 element of the crime of the Defendant's
7 guilt beyond a reasonable doubt. Now,
8 at times during the trial I mentioned
9 I sustained objections to questions
10 which were asked and I did not permit
11 the witness to answer or where an
12 answer had been made I instructed that
13 it be stricken from the record and
14 told you to disregard it and dismiss
15 it from your mind. You may not draw
16 any inference from an unanswered
17 question nor may you consider testimony
18 which has been stricken in reaching
19 your decision. The law requires that
20 your decision be made solely upon the
21 competent evidence before you. And
22 such items I have excluded from your
23 consideration are not legally admissible
24 and are not to be considered by you.
25 Now, there are two types of evidence

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9.

Full Text of Court's Instructions to the Jury.

1 which you may properly consider.
2 Proof may consist of the testimony
3 of those who have witnessed certain
4 conduct or heard certain statements
5 and who have come into the court room
6 and testified to that conduct or those
7 statements in the course of this trial
8 and this type of evidence is called
9 direct evidence or eyewitness evidence.
10 However, proof of a chain of circum-
11 stances which points to certain conduct
12 or statement is also admissible and
13 can be considered by you and this is
14 termed circumstantial evidence. You
15 are entitled to consider and find both
16 types of evidence, direct and circum-
17 stantial, bear on the question of the
18 innocence or guilt of Mr. Banks the
19 Defendant. As a general rule the
20 law makes no distinction between direct
21 and circumstantial evidence but simply
22 requires that before convicting the
23 Defendant you be satisfied of his guilt
24 beyond a reasonable doubt. The
25 Defendant here has offered evidence of

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WESTERN DISTRICT OF NEW YORK

10.

Full Text of Court's Instructions to the Jury.

1 good general reputation for honesty
2 and integrity and you are to consider
3 such evidence along with all other
4 evidence in the case. Evidence of
5 the Defendant's reputation inconsistent
6 with those traits of character ordin-
7 arily involved in the commission of
8 the crime as charged here may give
9 rise to a reasonable doubt because
10 you may think it improbable that a
11 person of good character in respect
12 to those traits would commit such a
13 crime. You have had tape recordings
14 of conversations which have been
15 identified by witnesses, and these
16 tape recordings have been received
17 in evidence, a transcript was furnished
18 for your guidance as you listened to
19 the tapes and to help you identify
20 the speakers. The tapes, however,
21 are the evidence in the case and the
22 transcripts themselves are not evidence.
23 We have admitted into evidence the
24 transcript of the final event, namely
25 that of March 11 but basically there

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WESTERN DISTRICT OF NEW YORK

11.

Full Text of Court's Instructions to the Jury.

1 again to the extent that the tape
2 was intelligible and it was not as
3 good as the others and the tape itself
4 is the basic evidence. Now, if you
5 perceived any variation between what
6 you heard on the tapes and what was on
7 the transcript you are to rely solely
8 upon what you heard on the tapes and
9 disregard what was on the transcript.
10 You have held them in your hand as you
11 watched. People have different retenti-
12 vity, if that is the word, of what they
13 see quickly. Some of you may have
14 photographic memories and be able to
15 have a instant recall of every word
16 or page. Some of you, like me, would
17 remember none of it. To the extent you
18 do remember it, however, I emphasize
19 that the tapes themselves are the
20 evidence and not the transcripts. Now,
21 you will have the tapes, you will have
22 the tapes available to you. We will
23 send the basic exhibits to you in the
24 jury room. You will be entitled to
25 refer to them. I will not send the

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12.

Full Text of Court's Instructions to the Jury.

1 tapes there because I don't have any
2 facility to send along with it to
3 enable you to play them for yourselves.
4 So if you want to refer again to any
5 one of the tapes you will let me know
6 and I will tell you in a moment how
7 to do that and we will arrange to bring
8 you into the court room and replay any
9 tape or tapes that you want.

10 Now, the evidence in the case
11 consists of the sworn testimony of
12 the witnesses regardless of who may
13 have called them and all of the
14 exhibits and photographs received in
15 evidence regardless of who may have
16 produced them, and the tape recordings.
17 The statements and arguments of counsel
18 are not evidence in the case. Any
19 evidence to which an objection was
20 sustained by me and any evidence or
21 restricting by me, again as I told you
22 before, is not to be considered. You
23 are to consider only the evidence in
24 the case but in your consideration of
25 the evidence in the case you are not

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13.

Full Text of Court's Instructions to the Jury.

1 limited to the bald statements of the
2 witnesses, in other words, you are not
3 limited solely to what you see and
4 hear the witnesses testify, you are
5 permitted to draw from facts which
6 you find to have been proven such
7 reasonable inferences as you feel are
8 justified. Now, this means that you
9 are permitted to draw from one fact
10 the existence of another if reason
11 and experience support that inference.
12 You may draw from facts which you find
13 have been proven such reasonable
14 inferences that seem justified by
15 reason and logic in light of your own
16 experiences in life. Now, basically
17 an inference is nothing more than a
18 deduction or conclusion which reason
19 and common sense lead you to draw
20 from the facts which have been proven.
21 Any inference which you draw from the
22 evidence must reasonably flow from the
23 evidence and must be based upon facts
24 established by the evidence. Because
25 a permissible inference in law must flow

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14.

Full Text of Court's Instructions to the Jury.

1 naturally and logically from and be
2 based upon facts established by the
3 evidence it follows that you may not
4 base further inferences merely upon
5 inferences already drawn. One
6 inference cannot be based upon or
7 drawn from another inference, it must
8 go back to the bedrock of facts proven
9 by the evidence. Now, you will be
10 dealing with intent and this, of
11 course, is the purpose or aim or state
12 of mind with which a person acts. An
13 act is knowingly done if it is done
14 voluntarily and intentionally and not
15 because of mistake or accident or other
16 innocent reason. Now, intent may be
17 proven by indirect or circumstantial
18 evidence, and you will recognize that
19 it can rarely be established by any
20 other means because while witnesses
21 may see and hear and be able to come
22 in and give direct or eyewitness testi-
23 mony as to what a person does or says
24 there can be no eyewitness account of
25 the state of mind with which the acts

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15.

Full Text of Court's Instructions to the Jury.

1 were done or statements made, but what
2 a person does or says may indicate
3 either intent or lack of intent to act.
4 Unless otherwise instructed in deter-
5 mining any issue involving intent you
6 are entitled to consider all of the
7 facts and circumstances in the case
8 which will aid you in determining
9 state of mind or intent. Now, you
10 as jurors or the sole judges of the
11 credibility, that is the believability
12 of the witnesses and the weight their
13 testimony deserves. You should care-
14 fully scrutinize the testimony given,
15 the circumstances under which each
16 witness testified and every matter
17 in evidence which tends to indicate
18 whether the witness is worthy of
19 belief. You bring into this, of course,
20 your own experience in your respective
21 lives which will enable you to say
22 whether or when somebody is telling
23 the truth. Now, you may consider any
24 bias or prejudice which was demonstrated
25 by a witness or any demonstrated hope

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WESTERN DISTRICT OF NEW YORK

16.

Full Text of Court's Instructions to the Jury.

1 of reward to be gained by the witnesses
2 testifying. I will tell you that you
3 should judge each witness's intelligence
4 and motive and state of mind and demeanor
5 and manner while he was on the stand.
6 Judge also any relation the witness
7 has or may bear to either side of the
8 case and the manner in which the
9 witness might be effected by your
10 verdict and the extent to which, if
11 at all, each witness is supported or
12 contradicted by other evidence. Now,
13 of course, the mere fact that the
14 testimony of a witness is inconsistent
15 or that there are discrepancies in
16 such testimony does not mean that you
17 must reject the witness's credibility.
18 You are to determine whether the
19 inconsistency or discrepancy is the
20 result of falsification or lying or
21 whether, on the other hand, it is a
22 result of innocent miscalculation or
23 inaccurate observation. You had
24 testimony by members of the Erie County
25 Sheriffs Department and their testimony

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WESTERN DISTRICT OF NEW YORK

17.

Full Text of Court's Instructions to the Jury.

1 is to be weighed the same as the
2 testimony of that of any other witness
3 and their testimony deserves no
4 greater and no lesser believability
5 simply because it comes from a police
6 officer. Now, if you find that any
7 witness has testified falsely or lied
8 with respect to any material portion
9 of his testimony you may disregard
10 that portion which you find to be
11 unbelievable or you may, if you desire,
12 disregard the entire testimony of that
13 witness. A witness lies or testifies
14 falsely if he does so knowingly and
15 intentionally and not merely because
16 of mistake or inadvertence or other
17 innocent reason. In evaluating
18 credibility you will, of course, determine
19 whether or not the testimony of a given
20 witness is inherently improbable or
21 contradictory with respect to any
22 material fact by other evidence in
23 the case.

24 I tell you also that the fact
25 that the United States of America is

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WESTERN DISTRICT OF NEW YORK

18.

Full Text of Court's Instructions to the Jury.

1 one party to this action, namely the
2 prosecutor, and that the Assistant
3 United States Attorney Mr. Wagner is
4 here as the attorney for the Government
5 is to be given no weight and will not
6 influence you at all in the case, they
7 are considered just as any other party
8 and Mr. Wagner no greater or less than
9 Mr. Hill or any other attorney. It is
10 your duty in the case to determine
11 whether or not the Government has
12 proven the Defendant's guilt beyond
13 a reasonable doubt. You are not to
14 concern yourself in any way with the
15 punishment Mr. Banks may receive if
16 convicted and you are not to speculate
17 concerning it. If he is convicted by
18 your verdict or verdicts his punishment
19 is my decision and my decision alone.

20 Now, getting down to the specifics
21 of this case Mr. Banks was charged
22 in this indictment which will be sent
23 to the jury room with you as Court
24 Exhibit A, and the fact that it has a
25 Court Exhibit is not to give it any

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WESTERN DISTRICT OF NEW YORK

Full Text of Court's Instructions to the Jury.

1 special weight with you, it is merely
2 a mechanism for putting a tag on it and,
3 of course, the indictment itself means
4 nothing other than to frame the parti-
5 cular charges. Of the indictment four
6 separate counts charges Mr. Banks with
7 having violated what is known as
8 Section 2023(b) of Title 7 of the
9 United States Code, this is in reference
10 to part of the laws of the United
11 States. These counts charge Mr. Banks
12 knowingly did acquire and possess Food
13 Stamp Coupons having a value in excess
14 of one hundred dollars in a manner not
15 authorized by law or by the regulations
16 issued pursuant thereto. Now, each of
17 the four counts deals with a single
18 violation of the same statute and they
19 differ only from each other as to the
20 dates and the amounts of the food stamps
21 involved. The rules of law applicable
22 to each of the four counts are the
23 same. He is charged in the indictment,
24 I am going to read only one of the
25 counts and then the others are paraphrased

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21

Full Text of Court's Instructions to the Jury.

1 Count I says that on or about the
2 25th day of February 1977, in the
3 Western District of New York, and this
4 is an area comprising seventeen counties
5 in this end of New York State and, of
6 course Erie County is one of those
7 seventeen counties, in the Western
8 District of New York, Glenn Banks
9 knowingly did acquire and possess
10 Food Stamp Coupons having a value in
11 excess of one hundred dollars in a
12 manner not authorized by Chapter 51 of
13 Title 7 of the United States Code or
14 the regulations issued pursuant thereto,
15 in that Glenn Banks did purchase from
16 Joseph Petronella, Detective, Erie
17 County Sheriff's Department, Food Stamp
18 Coupons with an aggregate face value
19 of one thousand dollars, and gave in
20 exchange three hundred dollars United
21 States currency; all in violation of
22 Title 7, United States Code, Section
23 2023(b). Count II, III and IV are
24 exactly the same except that in Count
25 II it is alleged that the events occurred

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WESTERN DISTRICT OF NEW YORK

21.

Full Text of Court's Instructions to the Jury.

1 on February 28, 1977 and that the
2 face value of the stamps was three
3 thousand dollars and Mr. Banks gave
4 nine hundred dollars United States
5 currency. Count III, the date is
6 March 7th 1977 and here the food
7 stamps had an aggregate face value
8 of one thousand forty dollars and in
9 exchange for them Mr. Banks is alleged
10 to have given four Panasonic black
11 and white television sets. Count IV,
12 the date is March 11th 1977 and the
13 aggregate face value of the food
14 stamps is thirty thousand dollars and
15 Mr. Banks is alleged to have given
16 nine thousand dollars in United States
17 currency in exchange for them. Now, I
18 emphasize that the indictment is only
19 a formal method of accusing Mr. Banks
20 of a crime, it is not evidence of any
21 kind against him. Mr. Banks is guilty
22 of this crime if other elements being
23 proven he acquired or possessed the
24 food stamps. However, there is in
25 the Government's proof or elsewhere in

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WESTERN DISTRICT OF NEW YORK

Full Text of Court's Instructions to the Jury.

1 total evidence nothing relating to the
2 Defendant's possession of food stamps
3 separate and apart from his alleged
4 acquisition of them and consequently
5 you are not to concern yourselves with
6 any other aspects of possession or
7 possession in and by itself. This has
8 reference to what we find in the indict-
9 ment where it says Mr. Banks knowingly
10 did acquire and possess. I only
11 emphasize that the only possession
12 that there is any support for in the
13 case is in connection with acquisitions,
14 it is really on the acquisition that you
15 will be focusing and not on the
16 possession per se. Now, the particular
17 section I referred to, Section 2023(b)
18 of Title 7, says whoever knowingly
19 acquires or possesses coupons in any
20 manner not authorized by this Chapter,
21 and that is Chapter 51 of Title 7,
22 or the regulations issued pursuant to
23 this Chapter shall if such coupons
24 have a value of one hundred dollars
25 or more be guilty of an offense against

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WESTERN DISTRICT OF NEW YORK

23.

Full Text of Court's Instructions to the Jury.

1 the laws of the United States. Now,
2 each of four essential elements is
3 required to be proved beyond a reasonable
4 doubt in order to establish the offense
5 that is charged in each count. Firstly,
6 that the Defendant acquired or possessed
7 the food stamp coupons as charged in
8 the indictment. Second, that the
9 Defendant acquired or possessed such
10 food stamps in a manner not authorized
11 by the Food Stamp Act of 1964 as amended
12 and the regulations issued thereunder
13 in the said Food Stamp Act that I have
14 read from and referred to. Thirdly,
15 that the coupons were of a value of
16 one hundred dollars or more. Fourth,
17 that the Defendant did such act or
18 acts knowingly. You will keep in mind
19 the burden is always upon the prosecu-
20 tion, the Government, to prove beyond
21 a reasonable doubt every essential
22 element of the crime charged in each
23 count of the indictment, that the law
24 imposes upon Mr. Banks in this criminal
25 case the burden or duty of calling any

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WESTERN DISTRICT OF NEW YORK

24.

Full Text of Court's Instructions to the Jury.

1 witnesses or producing any evidence.
2 Now, he has produced some as you know.
3 There is a fifth element that must be
4 proven in this case and this burden
5 also falls upon the Government, namely
6 that the Defendant Mr. Banks was not
7 entrapped into a commission of this
8 crime. You know from the arguments
9 of counsel that each of them considers
10 that to be the issue that you must
11 decide as to each of these events.
12 Now, the statute and the elements
13 use the term knowingly, and I tell you
14 that an act is done knowingly if it is
15 done voluntarily and intentionally and
16 not because of mistake or accident or
17 other innocent reason, and the purpose
18 of adding the word knowingly is to
19 be sure no one would be convicted of
20 a crime because of an act done pursuant
21 to mistake or accident or other innocent
22 reason. Now, this Food Stamp Act of
23 1964 has other pertinent provisions.
24 Section 2015(a) says that coupons
25 shall be issued only to households which

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25.

Full Text of Court's Instructions to the Jury.

1 have been duly certified and eligible
2 to participate in the Food Stamp
3 Program. Section 2019(b) says the
4 State Agency of each participating
5 State shall assume responsibility for
6 the certification of applicant house-
7 hold and for issuance of coupons.
8 I tell you that food stamps such as
9 we have been talking of here are coupons
10 within the meaning of the statute.
11 Section 271.4(a) of the regulations
12 of the United States Department of
13 Agriculture say that the State Agencies
14 shall provide for certification of
15 household by completion of the applica-
16 tion for participation. Going back to
17 the Food Stamp Act itself, Section
18 2015(d) says that coupons issued to
19 eligible household shall be used by
20 them only to purchase food in retail
21 food stores which have been approved
22 for participation in the Food Stamp
23 Program at prices prevailing in such
24 stores. And Section 2012(e) defines
25 the term household as meaning a group

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Full Text of Court's Instructions to the Jury.

1 of related individuals living as one
2 economic unit sharing common cooking
3 facilities and for whom food is custom-
4 arily purchased in common or a single
5 individual living alone who has cooking
6 facilities and who purchases and
7 prepares food for home consumption.
8 Section 2012(o) defines a coupon
9 vendor as being any person, partnership,
10 corporation, organization, political
11 subdivision or other entity with which
12 a State Agency has contracted for or
13 to which it has delegated administra-
14 tive responsibility in connection with
15 the issuance of coupons to households.
16 Now, if you find beyond a reasonable
17 doubt that the Defendant acquired these
18 food stamp coupons without being duly
19 certified as eligible for them upon
20 completion of the application or that
21 the Defendant acquired the food stamps
22 from someone other than a State Agency
23 or a coupon vendor which is delegated
24 by the State Agency to issue such
25 coupons then you may find that the

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WESTERN DISTRICT OF NEW YORK

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Full Text of Court's Instructions to the Jury.

1 element of acquiring the food stamp
2 coupons in a manner not authorized by
3 the Act or the regulation would be
4 present in the case. Now, from the
5 arguments of the attorneys you find
6 that there is not much issue on that
7 and the issue does bear mainly upon
8 entrapment but nevertheless that is
9 an element in the case, you must find
10 the stamps were to have been illegally
11 acquired. Now, as to entrapment,
12 Defendant and his counsel, his attorney,
13 have asserted that the Defendant was
14 a victim of entrapment as to the offense
15 charged in each count of the indictment.
16 If you find some evidence of the
17 Government's inducement of the Defen-
18 dant's conduct then you must further
19 find before you can convict the
20 Defendant that the Government has
21 proven beyond a reasonable doubt that
22 the Defendant was ready and willing
23 whenever a favorable opportunity was
24 presented to commit the crime charged
25 in each count of the indictment. Now,

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Full Text of Court's Instructions to the Jury.

1 where a Defendant has no previous
2 intent or purpose to violate the law
3 but is induced or enticed or solicited
4 or persuaded by law enforcement officers
5 or their agents to commit a crime he
6 is a victim of entrapment and the law
7 forbids his conviction in such case.
8 Government officers and their agents
9 may not entrap an innocent person
10 who except for the Government's
11 inducement would not have committed
12 the crime. Now, on the other hand,
13 where a Defendant already has the
14 readiness and the willingness to
15 break this law the mere fact that the
16 Government officers or their agents
17 provide what appears to be a favorable
18 opportunity is not entrapment. You
19 can give to the evidence of Defendant's
20 good character whatever weight you
21 think it should have in deciding
22 whether or not Defendant was ready
23 and willing. Now, if you find no
24 evidence of inducement you cannot find
25 entrapment. If having found some

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WESTERN DISTRICT OF NEW YORK

Full Text of Court's Instructions to the Jury.

1 evidence of inducement then if you
2 find that the Government has proved
3 beyond a reasonable doubt that before
4 anything at all occurred respecting
5 the alleged offenses in this case
6 the Defendant was ready and willing
7 to commit the crimes which are charged
8 in the indictment whenever opportunity
9 was afforded and that the Government
10 officers and their agents did no more
11 than offer the opportunity then you
12 should find that the Defendant was
13 not a victim of entrapment. On the
14 hand, if the evidence presented in
15 the case should leave you with a
16 reasonable doubt whether it has been
17 proven by the Government that the
18 Defendant had the previous intent or
19 purpose or readiness or willingness
20 to commit the offenses which are charged
21 apart from the inducement or persuasion
22 of some officer or agent of the
23 Government then you would find the
24 Defendant not guilty. Now, if you find
25 some evidence that Gray and/or Petronella

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OF THE COURT, U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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Full Text of Court's Instructions to the Jury.

1 induced the Defendant to commit this
2 crime the Government must prove beyond
3 a reasonable doubt that the inducement
4 was not the cause of the crime, that
5 is that the Defendant was ready and
6 willing to commit the crime having
7 the opportunity. You must resolve the
8 issue of entrapment separately as to
9 each transaction. Now, obviously
10 there is a factual relationship among
11 the four transactions. If you find
12 that the Government has failed to prove
13 beyond a reasonable doubt that there
14 was no entrapment on February 25th
15 you can, if you want, infer such failure
16 to the transactions occurring on
17 February 28th, March 7, and March 11.

18 Obviously the key event insofar as
19 entrapment is concerned is the February
20 25 transaction and how it came about.
21 You might infer that the other events
22 are not as significant. You might
23 decide that the Defendant only engaged
24 in deals on February 28, March 7 and
25 March 11 because he has been induced

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Full Text of Court's Instructions to the Jury.

1 into the February 25 transaction and
2 not that he had been ready and willing
3 before February 25 to deal illegally
4 in food stamps. Such willingness and
5 readiness is the key issue you must
6 determine. You may decide that the
7 events of February 28 or March 7 or
8 March 11 are helpful to your determina-
9 tion whether Defendant had been ready
10 and willing before February 25, the
11 date of the first transaction. Now,
12 I stress again that you are to find
13 the facts. Examples or factual indica-
14 tions that I have given do not indicate
15 any opinion on my part as to how you
16 should find on any issue of fact or
17 whether you should acquit or convict
18 the Defendant. These matters are
19 solely for your decision and I have
20 no part in making that decision other
21 than to tell you, as I have, what
22 the governing law is. Now, I remind
23 you that at the time you started this
24 case you took an oath as members of
25 the jury and you said you would well

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WESTERN DISTRICT OF NEW YORK

Full Text of Court's Instructions to the Jury.

1 and truly try the issues joined in
2 this case and a true verdict to give
3 therein according to the evidence so
4 help you God, and I suggest to you that
5 if you follow that oath and you try
6 the issues without combining your
7 thinking with any emotions you will
8 arrive at a true and just verdict but
9 it must be clear to you that once you
10 get into an emotional state and if you
11 let bias or sympathy or prejudice
12 interfere with your thinking then you
13 will not arrive at a true and just
14 verdict. Now, as you deliberate
15 please be careful to listen to the
16 opinions of the other jurors and ask
17 for an opportunity to express your own
18 views. No one juror holds the center
19 stage in the jury room and no one juror
20 monopolizes the deliberations. Now,
21 if after listening to the other jurors
22 and after stating your views you become
23 convinced that your view is wrong
24 don't hesitate because of stubbornness
25 or because of pride of opinion to change

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33.

Full Text of Court's Instructions to the Jury.

1 your own view but, on the other, do
2 not surrender your honest conviction
3 merely because you are outnumbered.
4 As I said, your verdict has to be
5 unanimous, it has to represent the
6 absolute conviction of each one of
7 you. You will return a verdict as to
8 Mr. Banks' guilt or innocence on each
9 count of the indictment, and each
10 verdict has to be reached unanimously
11 all twelve of you have to agree on the
12 particular result. You will have the
13 indictment in the jury room. I remind
14 you again it is merely a guideline and
15 there is no evidence of any criminality
16 on the part of Mr. Banks.

17 Now, in the jury room as the
18 first order of business maybe - well,
19 it will be the first order of business,
20 you should select one of your number
21 to speak for you when you return to
22 Court or when you have to be in touch
23 with me. The second order of business
24 will be lunch which we will arrange
25 forthwith for you. Now, so far as

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Full Text of Court's Instructions to the Jury.

1 communications, this is to be done by
2 means of a note or notes which having
3 been written out you hand to the Deputy
4 Marshall who will be on duty outside
5 of your jury room. The Deputy Marshall
6 will see that the note gets to me.
7 Now, don't ask the Deputy Marshall
8 about any question about your duties.
9 If you have any questions about them
10 or any other questions write out a
11 note and send it to me. You can
12 request a clarification of these
13 instructions, you can request a reading
14 of my instructions or all or a part
15 of the testimony of any witness, and,
16 of course, it has been mentioned you
17 are entitled to request also a replaying
18 to you in the court room of one or more
19 of the tapes or any part of the tapes.
20 Now, use a note also to tell me when
21 you reach a verdict or as happens once
22 in awhile when you find yourselves
23 so deadlocked that you feel that unanimity
24 is impossible but never tell me or any-
25 one else whether you are in the court

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WESTERN DISTRICT OF NEW YORK

35.

Full Text of Court's Instructions to the Jury.

1 room or not how your voting stands at
2 anytime except when you are returning
3 a verdict and then, of course, I know
4 it is being returned unanimously.

5 Gentlemen, are there any exceptions
6 or requests and if so do you want to
7 be heard out of the presence of the
8 Jury?

9 MR. WAGNER:

Your Honor, I would like to be
heard briefly outside the presence of
the Jury.

11 THE COURT:

All right. Do you have any?

12 MR. HILL:

Yes, your Honor.

13 THE COURT:

14 All right. I will just have to
15 ask you to step down into my hallway
16 briefly, ladies and gentlemen.

17 (Jury escorted from the court
18 room.)

19
20 THE COURT:

Mr. Wagner.

21 MR. WAGNER:

22 Your Honor, I would only mention
23 that the Defendant when he testified
24 implied that perhaps he was using
25 someone else's money and I would ask

Full Text of Court's Instructions to the Jury.

1 that perhaps the Jury be instructed
2 that under Section 2 a person who
3 assists another one to commit the
4 crime is as guilty as the principal
5 and that that alone would not be
6 a defense. Particularly forthwith
7 with respect to the third transaction
8 where he according to his own testimony
9 was intending to use someone else's
10 money for all of it and turn all of the
11 stamps over, and it seems to me that
12 the Jury should be instructed that that
13 is as much a crime as whether he intended
14 to gain from it himself.

THE COURT:

15 I had this in my mind earlier,
16 particularly as the evidence came in
17 this morning and during your summations,
18 I did not know whether I would have a
19 request for it or not but I decided
20 that it is not appropo in this indictment.
21 In this indictment Mr. Banks is charged
22 with carrying out certain illegal
23 transactions and if we move Mr. Banks
24 in any one of those counts from a
25 position of a principal to a position

Full Text of Court's Instructions to the Jury.

1 of an aider or an abettor we end up
2 with no one being charged as the
3 principal and semantically, perhaps
4 erroneously, I don't know, something
5 that might lend itself to research
6 or might not, I had determined that
7 it is not pertinent and it has no
8 place here so I decline to do that.

9 Mr. Hill.

10 MR. HILL: Your Honor, I request that the
11 Court instruct the Jury that the
12 inducement element of entrapment is
13 a matter of law, that is in the case
14 it's a matter of law.

15 THE COURT: And as I told you I denied that
16 request that you made earlier and I
17 deny it now.

18 MR. HILL: That's my only request.

19 THE COURT: All right.

20 MR. HILL: Do you want exceptions now, your
21 Honor?

22 THE COURT: Take your exception.

23 MR. HILL: Yes. I except to the charge --
24 I don't know if Mr. Wagner wants
25 to go first.

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Full Text of Court's Instructions to the Jury.

1 MR. WAGNER:

No, I do not.

2 MR. HILL:

3 Your Honor, with respect to the
4 portions of the charge where you refer
5 to the Defendant's readiness and
6 willingness to engage in the conduct
7 charged I feel that the charge omitted
8 an important piece of language that
9 appears in the vast majority of the
10 Section Circuit cases that I have read,
11 if not all of them, that is readiness,
12 readiness and willingness without
13 persuasion to engage in the conduct.
14 I think that element of persuasion is
15 a very important one so I except to
16 the charge on the basis that it was
17 not included.

18 THE COURT:

19 I believe that I have covered
20 that adequately and you have your
21 exception.

22 MR. HILL:

Thank you, your Honor.

23 And my second final exception
24 to the charge, and I'm not sure,
25 perhaps I misunderstood the Court's
charge but I'm not sure if it informed
the Jury that they were free to consider

Full Text of Court's Instructions to the Jury.

1 each transaction separately as opposed
2 to being a unified series of transactions
3 where the initial entrapment would taint
4 them all and I would except to the
5 charge on that basis, as I heard it
6 at least, to permit the Jury to do that.

7 THE COURT: Probably no less than six or
8 seven times I did emphasize to the
9 Jury that they were to consider each
10 count and each crime --

11 What is happening there?

12 THE CLERK: The Marshall asked me to come
13 over, your Honor. I don't know what
14 it is.

15 DEPUTY MARSHALL: Judge, one of the jurors insists
16 that he has to go to the men's room.

17 THE COURT: Just have the juror be a little
18 controlling for a moment, it will be
19 very quick.

20 DEPUTY MARSHALL: Yes.

21 THE COURT: No less than six or seven times
22 did I emphasize to them that they were
23 to consider each count and each crime
24 separately and it was only in the one
25 phase of the instructions at the tail

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Full Text of Court's Instructions to the Jury.

1 end of that part which dealt with
2 entrapment where I talked about the
3 obvious interrelationship among the
4 four and told them how they might have
5 cross references running in both
6 directions from other events but I
7 think they are left clearly with the
8 understanding they are to be dealt with
9 separately.

MR. HILL:

That's all I have, your Honor.

THE COURT:

All right.

Bring them back.

(Jury present.)

THE COURT:

You don't have to take your
seats.

Swear the Deputy Marshalls.

(Two Deputy Marshalls were duly
sworn.)

THE COURT:

All right. Now, Mrs. Williams
and Mr. Schmid remain in the room.
Do either of you have personal items

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WESTERN DISTRICT OF NEW YORK

41.

Full Text of Court's Instructions to the Jury.

1 downstairs, do you?

2 ALTERNATE JUROR NO. 1: Yes, I have.

3 ALTERNATE JUROR NO. 2: Yes.

4 THE COURT: We will see that they are gotten.

5 The other twelve - Mr. Schmid

6 is an alternate and Mrs. Williams

7 is an alternate, the other twelve

8 go with the Deputy Marshalls and go

9 downstairs and we will send the

10 exhibits to you and proceed, and we

11 will arrange lunch forthwith, and

12 the first order of business select

13 someone to be your spokesman.

14 Mrs. Williams and Mr. Schmid ,

15 remain in the court room, we will see

16 that you get your garments out of the

17 room and anything else you have there.

18

19 (At 1:24 p.m., the Jury retired

20 to commence their deliberations.)

21

22 THE COURT: Now, was either one of you the

23 person who needed to go to the rest-

24 room immediately?

25 ALTERNATE JUROR NO. 1: I was.

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Full Text of Court's Instructions to the Jury.

1 THE COURT: All right. Go and come back.

2
3 (Alternate Juror No. 1 left the
4 court room.)

5
6 (Alternate Juror No. 1 returned
7 to the court room.)

8
9 THE COURT: Did you have any item of clothing
10 downstairs, Mr. Schmid ?

11 ALTERNATE JUROR NO.1: No, I don't.

12 THE COURT: Now, we have come to the point
13 where, of course, Mrs. Williams and
14 Mr. Schmid , I have to cut you loose
15 from the Jury because you have served
16 your role as being alternates. You
17 have been our insurance policy against
18 something happening to one or more of
19 the other jurors in which case you would
20 have stepped into or climbed into
21 their chairs and taken their position
22 on deliberations which sometimes is an
23 unsatisfying result because you have
24 paid attention, both of you, I could
25 observe to the evidence and to my

Full Text of Court's Instructions to the Jury.

1 instructions and to the arguments and
2 now you are denied that role in deciding
3 how the case should end up. Neverthe-
4 less, as I said, you have been an
5 important role to us and we could not
6 foreseeably have gone along without
7 you. Now, you are free to go at this
8 time.

9 I guess we will let each of them
10 know when we need to have them back,
11 Mr. Walsh?

12 THE CLERK:

Yes, your Honor.

13 THE COURT:

14 You are free to talk with the
15 attorneys or the parties as you want
16 but I emphasize two things, one, there
17 is no obligation on your part to talk
18 to anybody, you may if you want to,
19 and all I tell you is that if you are
20 inclined to talk with anybody about the
21 case please wait until the Jury has
22 returned its verdict. Now, you will
23 be leaving, you won't know exactly
24 when that verdict will be returned but
25 you can well anticipate that by the
time they get into early evening anyway

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44.

Full Text of Court's Instructions to the Jury.

1 that it will have been returned and
2 after that time you can do as you
3 want about talking with anybody.
4 Thank you again, and you may leave.

5
6 (Alternate Juror No. 1 and
7 Alternate Juror No. 2 excused.)

8
9 * * * * *

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WESTERN DISTRICT OF NEW YORK

45.

Full Text of Court's Instructions to the Jury.

1 PROCEEDINGS: September 20, 1977, 3:47 p.m.

2 APPEARANCES: As before noted.

3
4 (Defendant present.)

5
6 (Jury present.)

7
8 THE COURT: Who is speaking for the Jury?

9 THE FOREMAN (JUROR NO. 12): I am.

10 THE COURT: I have a request to ask me a
11 question.

12 THE FOREMAN: Right. The panel would like to
13 know how, in what manner a conviction
14 on the First Count would affect the
15 other three, if any?

16 THE COURT: Well, each one as I indicated
17 to you would be dealt with separately.
18 You have to come to a determination
19 as to each count finding or not finding
20 the proof of the elements that I gave
21 you as to each count. Now, beyond
22 that it has no affect at all. Obviously
23 the facts that you heard shows inter-
24 relationship but, nevertheless, each
25 one would be independently determined

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WESTERN DISTRICT OF NEW YORK

46.

Full Text of Court's Instructions to the Jury.

1 as to whether Mr. Banks was guilty
2 or not guilty. I gave the Jury some
3 considerations as to the factor of
4 readiness and willingness, the factor
5 of inducement might come into that
6 picture, is that part of your problem?

THE FOREMAN:

7 Yes, yes, that is part of the
8 problem.

THE COURT:

9 It really becomes a factual
10 consideration. You have to determine
11 once there is evidence, some evidence
12 as there is in this case and as Mr.
13 Wagner admits there is some evidence
14 of inducement of active initiation
15 by the Government, then you have to
16 determine whether or not Mr. Wagner
17 has proved beyond a reasonable doubt
18 either that the inducement had with
19 no substantive part of the criminality
20 or that even if it was Mr. Banks prior
21 to that was ready and willing to do
22 this type of criminal act if he had
23 the opportunity. Now, this is a factual
24 determination. If you make a determina-
25 tion that involves that as to one count

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WESTERN DISTRICT OF NEW YORK

17.

Full Text of Court's Instructions to the Jury.

1 you still have to separately make it
2 as to the other but obviously it cuts
3 both ways. You might if you did find,
4 for example, that he had been ready
5 and willing to carry out the deal of
6 February 25 which is Count Number 1
7 you might say that he obviously then
8 was ready and willing to carry out
9 any subsequent one because readiness
10 and willingness has to exist before
11 the event, before the Government comes
12 into the picture. You could, if you
13 in determining whether or not Mr.
14 Banks was ready and willing to enter
15 into any of the deals, say on February
16 28 you could consider what happened
17 on the other deals in trying to give
18 you some appraisal of his intent of
19 his state of mind of his readiness
20 or unreadiness or willingness or unwill-
21 ingness, you put it all together and
22 bring it to bear upon the particular
23 count, but the essence of the situation
24 is that you must determine each count
25 independently, and as to each where

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48.

Full Text of Court's Instructions to the Jury.

1 Mr. Banks is saying as to each "I was
2 entrapped", then you have to determine
3 whether he was entrapped as to that
4 particular count which again gets back
5 to whether the inducement was the
6 factor or whether he was ready and
7 willing to do that particular deal.

8 THE FOREMAN:

On each count?

9 THE COURT:

On each count. Does that answer
10 your question?

11 You can sort of consult quietly
12 if you want to.

13 THE FOREMAN:

All right. If he was found
14 guilty or innocent of the first count,
15 either way, would that - that could
16 have a bearing on the other three
17 counts?

18 THE COURT:

Well, the facts that underly your
19 determination of guilt or innocence
20 on the first count can have some rela-
21 tionship to that same determination
22 as to any of the other counts. In
23 other words, you might find maybe from
24 looking at Mr. Banks on the stand you
25 may decide, well, he obviously was

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49.

Full Text of Court's Instructions to the Jury.

1 ready and willing to do it, you know,
2 you can gather something from credibility,
3 and so forth, or you might say in looking
4 at him and listening to him talk, why,
5 obviously he would not go into it, or
6 you can consider the character witnesses,
7 obviously he would not go into it.
8 Now, that type of fact, and this is
9 just an example, could lard through
10 your considerations as to each of the
11 four counts, you can take that general
12 consideration and apply it to each one.
13 It may have a different affect as to
14 each one. Other facts may have the
15 same determination. But in the bottom
16 line you have got to determine as to
17 each count whether each of the four
18 elements I gave you was present including
19 the fifth element, the proof that there
20 was no entrapment.

21 THE FOREMAN:

Let me put it another way now.

22 THE COURT:

All right.

23 THE FOREMAN:

24 If we found that he was entrapped
25 on the first count, now, that would not
automatically exonerate him on the other

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WESTERN DISTRICT OF NEW YORK

50.

Full Text of Court's Instructions to the Jury.

1 three, they still would have to be
2 judged separately? That's where our
3 concern is.

4 THE COURT:

They would still have to be"
5 judged separately, that is right.

6 Obviously if you had reached a determina-
7 tion that he was entrapped on the first
8 one, leaving it to you to decide, but
9 that would be a strong factor in my
10 determination. Now, again, this is -
11 my comment is just for me and it is
12 up to you to determine but as to the
13 events of March 7, for example, if
14 you - well, let me back up a little
15 bit. It may not be that strong and,
16 again, it is up to all of you to say
17 whether it has any weight or what
18 weight it has, but a finding that he
19 was not ready and willing to participate
20 prior to February 25 might not necessari-
21 ly foreclose your finding that he was
22 ready and willing to act for the 28th
23 or the 7th or the 11th, but you would
24 put into that consideration whether
25 the readiness and willingness that

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WESTERN DISTRICT OF NEW YORK

51.

Full Text of Court's Instructions to the Jury.

1 you might find before event number
2 two, three and four came about because
3 of his being enticed into the first
4 event. You have got to make it as to
5 each count, each crime, but you take
6 all of the evidence you have got in the
7 case and bring it to bear, bring it
8 to focus upon the events you are
9 talking about, finding out as to that
10 event whether prior to the Government
11 coming into the picture as to that
12 event he was ready and willing to
13 participate if he had the opportunity.

14 THE FOREMAN:

Thank you, sir.

15 THE COURT:

All right.

16
17 (At 3:56 p.m., the Jury again
18 retired to continue their deliberations.)

19
20 MR. HILL:

Your Honor, may I be heard?

21 THE COURT:

Yes, Mr. Hill.

22 MR. HILL:

23 Your Honor, just for the record,
24 I would again except to the instructions
25 that you just gave the Jury on the
 ground that it again suggests that they

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Full Text of Court's Instructions to the Jury.

1 can consider each of the later time,
2 after the 25th, as a separate
3 transaction. Again, with that circum-
4 stance it would be requested in the
5 instruction that if they find entrap-
6 ment as to the 25th that they should
7 find continuing entrapment as a matter
8 of law as to the other three transac-
9 tions.

THE COURT:

Well, it does not follow the
matter of law, Mr. Hill, and it seems
to me to fly a big in the fact of the
exception you took after my basic
charge that I did not sufficiently
separate the four transactions to the
Jury. I think they have to be dealt
with separately even though the factual
considerations can interrelate. You
have an exception.

Mr. Wagner?

MR. WAGNER:

Nothing else, your Honor.

THE COURT:

All right.

* * * * *